

**A Amar Singh a/l Sundar Singh & Ors v Jivanjit Kaur d/o Sohan
Singh**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-391
OF 2004
HELILIAH, MOHD HISHAMUDIN AND RAMLY ALI JJCA
16 JUNE 2010

C *Land Law — Vacant possession — Claim for — Unlawful occupation — Whether
plaintiff held legal title subject to beneficial and equitable interests of defendants —
Defence of proprietary estoppel — Whether defendants established defence of
proprietary estoppel — Whether licence could create proprietary interest in land —
Whether plaintiff's legal title negated by first defendant*

D The plaintiff was the registered owner of a piece of land measuring approximately 40,000 ('the land'), which she inherited from her late husband, the brother of the first defendant. The land was transferred to the plaintiff on 13 January 1995 under an order of distribution under the Small Estates (Distribution) Act 1955, after the death of her husband in 1994 but the first defendant claimed that he had proprietary estoppel over that part of the land on which he had built his house ('the claimed portion'). According to the first defendant he had built his house on the land and occupied it since 1952 as directed by his mother, the registered owner of the land at that time, and that as such the plaintiff's late husband held the land subject to the first defendant's equity and interest in respect of the claimed portion. On 7 October 1998 the plaintiff issued a letter of demand to evict the first defendant and his sons ('the second and third defendants') from the claimed portion but the defendants refused to move out and continued to occupy the said house. The first defendant then proceeded to enter a private caveat on the land. Thereafter, the plaintiff commenced an action against the defendants for unlawful occupation of the claimed portion of the land and for the withdrawal of the caveat entered on the land by the first defendant. It was the plaintiff's contention that the occupation of the claimed portion was unlawful as it was without her express or implied consent. In their defence the defendants claimed that the plaintiff held the legal title subject to the beneficial and equitable interests of the defendants. By asserting the doctrine of proprietary estoppel the defendants sought to estop the plaintiff from enforcing her legal property rights and also sought to transfer the property rights in the claimed portion to the first defendants and his sons.

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I The trial judge entered judgment in favour of the plaintiff and granted the plaintiff, inter alia, vacant possession of the claimed portion with rent to be assessed by the deputy registrar from the date of the notice, ie from 7 October 1998, with interest and costs. This was the defendants' appeal against that decision. In their appeal the defendants submitted that the trial judge had

failed to make a proper judicial appreciation of the entire facts and had drawn improper inferences therefrom and that there was a serious misdirection of law when the trial judge failed to appreciate that the defendants had established a defence of proprietary estoppel.

Held, dismissing the appeal with costs:

- (1) In this appeal the defendants had not ventilated on the actual elements of equitable estoppel they were relying upon with clarity. The first defendant's case depended on the verbal assurances of his mother and the conduct of his late brother who were now deceased persons. The circumstances of this appeal do not show whether there was a fostering of an expectation or a unilateral mistake of a right to the claimed portion of the land. Although the first defendant adduced evidence that he had secured the permission of his parents to remain on the claimed portion, it was also found that the land was transferred to his mother upon the demise of his father and then conveyed to the plaintiff's late husband before the mother's demise. Further the element of detriment, which is an essential ingredient of proprietary estoppel, was not properly proved in the circumstances of this appeal (see paras 11, 18, 22, 26 & 28).
- (2) In this appeal there was no evidence of a contractual arrangement other than a family arrangement. The evidence furnished by the first defendant did not establish anything to negate that the legal title to the land in its entirety did not vest in the plaintiff. The first defendant's averment that he had expended monies also lacked details and particulars (see para 25).
- (3) In this case the first defendant was not only seeking to enforce an equity for himself but also for such an equity to be extended to his sons. Overall it was not denied that the first defendant in this case had been permitted a licence. The court cannot create a proprietary interest in land tenure arising from a licence within a family relationship. As such no finding could be made in this appeal that the trial judge had misdirected himself on a question of law. However, it was not reasonable for the trial judge to order the revocable licence to be withdrawn when the defendants had been ordered to give vacant possession within four months. Thus the High Court order was affirmed but substituted with an order that vacant possession be given within six months from this order (see paras 30, 32, 36–39).

[Bahasa Malaysia summary]

Plaintif merupakan pemilik berdaftar bagi sebidang tanah berkeluasan kira-kira 40,000 kaki persegi ('tanah tersebut'), yang mana diwarisinya daripada mendiang suaminya, abang kepada defendan pertama. Tanah

- A tersebut telah dipindah milik kepada plaintif pada 13 Januari 1995 di bawah perintah pengagihan mengikut Akta Harta Pesaka Kecil (Pembahagian) 1955, selepas kematian suaminya pada 1994 tetapi defendan pertama mendakwa dia mempunyai estoppel proprietari terhadap sebahagian tanah tersebut di mana dia telah membina rumahnya ('bahagian yang dituntut'). Mengikut defendan
- B pertama, dia telah membina rumahnya di atas tanah tersebut dan mendiami rumah tersebut sejak 1952 seperti yang diarahkan oleh ibunya, pemilik berdaftar tanah tersebut pada masa itu, dan dengan itu, mendiang suami plaintif telah memegang tanah tersebut tertakluk kepada ekuiti dan faedah defendan pertama berkenaan dengan bahagian yang dituntut. Pada 7 Oktober
- C 1998, plaintif telah mengeluarkan surat tuntutan untuk mengusir defendan pertama dan anak-anak lelakinya ('defendan pertama dan kedua') daripada bahagian yang dituntut tetapi defendan-defendan ingkar untuk berpindah keluar dan terus menetap di rumah tersebut. Defendan pertama kemudian memasukkan kaveat persendirian ke atas tanah tersebut. Kemudian plaintif
- D mengambil tindakan terhadap defendan-defendan kerana menetap di bahagian yang dituntut secara tidak sah dan bagi defendan pertama untuk menarik balik kaveat yang dimasukkan ke atas tanah tersebut. Ia merupakan hujah plaintif bahawa penghunian di atas bahagian yang dituntut adalah tidak
- E sah kerana tidak mendapat persetujuan nyata atau tersirat daripadanya. Dalam pembelaan mereka, defendan-defendan mendakwa bahawa plaintif memegang hak milik sah tertakluk kepada kepentingan benefisial dan ekuiti defendan-defendan. Dengan menunjukkan doktrin estoppel proprietari, defendan memohon untuk memindahkan hak-hak harta bahagian yang
- F dituntut kepada defendan pertama dan anak-anak lelakinya. Hakim bicara membuat penghakiman berpihak kepada plaintif dan memberi kepada plaintif, antara lain, milikan kosong bahagian yang dituntut bersama sewa untuk dinilai oleh timbalan pendaftar dari tarikh notis, iaitu dari 7 Oktober 1998, dengan faedah dan kos. Ini merupakan rayuan defendan-defendan
- G terhadap keputusan tersebut. Dalam rayuan mereka, defendan-defendan berhujah bahawa hakim bicara telah gagal untuk membuat penghargaan kehakiman yang sewajarnya terhadap keseluruhan fakta-fakta dan telah membuat inferens-inferens tidak wajar daripadanya dan bahawa terdapat penyalaharahan undang-undang yang serius apabila hakim bicara gagal untuk
- H menghargai bahawa defendan-defendan telah membuktikan pembelaan estoppel proprietari.

Diputuskan, menolak rayuan dengan kos:

- I (1) Di dalam rayuan ini defendan-defendan tidak mengemukakan elemen-elemen sebenar estoppel yang adil yang mereka bersandarkan dengan jelas. Kes defendan pertama bergantung kepada janji lisan ibunya dan tindakan abangnya yang kedua-duanya telah meninggal dunia. Keadaan rayuan ini tidak menunjukkan sama ada terdapat galakkan untuk harapan atau kesilapan sebelah pihak mengenai hak

untuk bahagian tanah yang dituntut. Walaupun defendan pertama mengemukakan keterangan bahawa dia telah mendapatkan kebenaran ibu bapanya untuk terus tinggal atas bahagian yang dituntut, ia juga didapati bahawa tanah tersebut telah ditukar milik kepada ibunya selepas kematian bapanya dan kemudian telah ditukarkan kepada mendiang suami plaintif sebelum kematian ibunya. Elemen lanjut tentang penjejasan, yang merupakan unsur penting estoppel proprietari, tidak dibuktikan secara wajar di dalam keadaan rayuan ini (lihat perenggan 11, 18, 22, 26 & 28).

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- (2) Di dalam rayuan ini tidak ada keterangan mengenai aturan kontrak selain daripada aturan keluarga. Keterangan yang diberikan oleh defendan pertama tidak membuktikan apa-apa untuk menafikan hak undang-undang terhadap tanah secara keseluruhannya tidak terletak hak kepada plaintif. Kenyataan defendan pertama bahawa dia telah membelanjakan wang juga tidak disokong oleh apa-apa butiran (lihat perenggan 25).

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- (3) Di dalam kes ini defendan pertama bukan hanya memohon untuk melaksanakan ekuiti untuk dirinya sendiri tetapi juga untuk ekuiti dilanjutkan kepada anak-anaknya. Secara keseluruhannya tidak dinafikan bahawa defendan pertama di dalam kes ini telah diberikan lesen. Mahkamah tidak boleh membentuk kepentingan proprietari terhadap pemegangan tanah berbangkit daripada lesen di dalam hubungan kekeluargaan. Oleh itu tidak ada penemuan yang boleh dibuat di dalam rayuan ini bahawa hakim bicara telah tersalah arah dirinya dalam persoalan undang-undang. Walau bagaimanapun, ia tidak munasabah bagi hakim bicara untuk memerintahkan lesen yang tidak boleh batal ditarik balik apabila defendan-defendan telah diperintahkan untuk memberikan milikan kosong dalam tempoh empat bulan. Oleh itu perintah Mahkamah Tinggi disahkan tetapi digantikan dengan perintah bahawa milikan kosong diberikan dalam tempoh enam bulan dari tarikh perintah ini (lihat perenggan 30, 32, 36–39).]

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Notes

For cases on claim for vacant possession, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4900–4901.

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Cases referred to

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)

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Commonwealth of Australia v Verwayen (1990) 170 CLR 394, HC (refd)

Crabb v Arun District Council [1976] Ch 179, CA (refd)

Gillett v Holt and another [2000] 2 All ER 289, CA (refd)

Inwards and others v Baker [1965] 1 All ER 446, CA (refd)

- A** *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, FC (refd)
Pascoe v Turner [1979] 2 All ER 945, CA (refd)
Radaich v Smith (1959) 101 CLR 209 (refd)
Sir JW Ramsden, Bart v Lee Dyson and Joseph Thornton (1865) LR 1 HL 129, HL (refd)
- B** *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd; Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] 1 QB 133, Ch D (refd)
United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi [1984] 2 MLJ 87, PC (refd)
Waltons Stores (Interstate) Ltd v Maher and another (1988) 164 CLR 387, HC (refd)
- C** *Willmott v Barber* (1880) 15 Ch D 96, Ch D (refd)

Legislation referred to

- D** Civil Law Act 1956 ss 3(1), 6
National Land Code s 206(1), (2), (3)
Small Estates (Distribution) Act 1955

Appeal from: Civil Suit No S6(S3)–22–756 of 1998 (High Court, Kuala Lumpur)

- E** *Harpal Singh Grewal (Parvinder Singh Doal with him) (Pritam Doal & Co) for the appellants.*
T Gunaseelan (Gunaseelan & Associates) for the respondent.

Heliliah JCA (delivering judgment of the court):**F**

[1] This is an appeal against the decision of the High Court ('HC') judge dated 30 March 2004 whereby the following orders were granted:

- G** (a) vacant possession be given within four weeks of the portion of the land under GM 1164 Lot 4159 Mukim Batu being occupied by the defendant;
- (b) rent to be assessed by the deputy registrar as from the date notice of 7 October 1998;
- H** (c) interest at 8% from date of judgment to settlement;
- (d) costs; and
- (e) the defendants' caveat to be withdrawn within four weeks.

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[2] The respondent in this appeal is the plaintiff while the appellants are the defendants in the original action. Hereinafter the respondent and the appellants shall be referred to as the plaintiff and defendants respectively. In the appeal before us the central argument is the right of any of the defendants to

continue to remain on the portion of the land as mentioned above. In the grounds of judgment the facts as elucidated are as follows:

- (a) The plaintiff inherited the land held under GM 1164 Lot 4159 Mukim Batu, measures approximately 40,000 square feet ('the said land') from her husband, Balwant Singh a/l Sunder Singh, the brother of the first defendant. They were married in 1956. The said land was transferred to the plaintiff on 13 January 1995 under an order of distribution under the Small Estates (Distribution) Act 1955 after Balwant Singh died in 1994.
- (b) The defendants occupy the house 241-C, Sentul Pasar, 51100 Kuala Lumpur, built upon a 4,000 square feet portion of the piece of land known as GM 1164 Lot 4159 in Mukim Batu ('the claimed portion'). The plaintiff is now the registered owner of the entire piece of land ('the said land'). The defendants have refused to move out and continued to occupy the said house.
- (c) According to the first defendant:
 - (i) He had lived on the said land with his parents since 1929. The first defendant married in India in 1949. He returned to Kuala Lumpur with his wife the following year. At that time, his mother was the registered owner.
 - (ii) His mother told him to build his home on the claimed portion, which he did. He had thus built the house known as 241-C and occupied it since 1952. According to the first defendant, his mother had told him on various occasions that the house belonged to him and his children. In addition he had built a further ten units of houses on the said land to be rented out. The rent had supported his mother. The first defendant said he maintained and improved the buildings between 1952 and 1980.
 - (iii) When his father passed away on 30 December 1979, his mother decided to transfer the whole of the said land to Balwant Singh with instructions to the latter that the said building on the claimed land to be registered in the name of the first defendant. Balwant Singh and his family also lived on the said land. The first defendant said he had given a copy of his identity card to Balwant Singh but only realised through this action that he had not registered the building in his name.
 - (iv) The said land was transferred to Balwant Singh on 25 January 1980. On 8 September 1987, their mother passed away. Balwant Singh himself died on 11 May 1994. After the land was

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A transferred to the plaintiff's name, she collected the rents and paid the quit rents and assessments.

(v) The plaintiff issued a letter of demand to evict the defendants from the claimed portion 241-C on 7 October 1998.

B (vi) On 2 Mac 1999, the first defendant entered a private caveat on the land.

(d) In his defence in this action the defendants pleaded:

C (i) 'proprietary estoppel';

(ii) that Balwant Singh held the land subject to his equity and interest in respect of the building.

D [3] We have examined the grounds of judgment of the learned HC judge dated 30 March 2004. There are various complaints advanced in support of the appeal but primarily they are as follows:

(a) the judge has failed to make a proper judicial appreciation of the entire facts and has drawn improper inferences therefrom; and

E (b) there is a serious misdirection of law including a failure to appreciate that the defendants have established a defence of proprietary estoppel.

F [4] Submissions have also been made that the plaintiff is bound by the statement of claim ('SC') which has been crafted in such a way that the defendants are in occupation of certain portions of land belonging to the plaintiff upon which has been built a building. The SC also claims that despite repeated requests being made the defendants have failed to comply or ignored the requests for the first defendant and his sons to vacate. It is averred that the occupation of the said land by the defendants is unlawful as it was so occupied without the express or implied consent of the plaintiff. The SC referred to the allegation made by the defendants vide letter dated 5 November 1998 that the first defendant is the registered owner of the immoveable property in question and that his two sons have the right to occupy the property concerned.

H [5] The defence claimed is that even if the said land is held under a legal title it is held subject to the beneficial and equitable interests not only of the first defendant but also of his sons. The counterclaim of the defendants went beyond, in that there is a claim to legal ownership.

I [6] In the course of his judgment the learned trial judge made observations which constitute specific findings of facts. Before referring to the specific findings it is also noted that the dispute has arisen out of family relationship or arrangements. At the outset the parties were urged to contrive some effort

towards attaining a settlement on the dispute since the first defendant is none other than the brother in law of the plaintiff but this was of no avail. We then proceeded to hear the appeal.

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[7] Before us it is alleged that there has been a failure to appreciate the facts judicially. However having appraised the evidence it cannot be said that the first defendant and his sons have succeeded on a balance of probabilities of rebutting the plaintiff's legal status over the land which includes the claimed portion on which is sited a dwelling house occupied by the first defendant and his sons.

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[8] The learned trial judge has made certain findings of facts which have been assailed in this appeal. It has been vociferously contended that the plaintiff has failed in the assertion that the character of occupation is a temporary licence since that issue relate to facts occurring before 1956, and hence it is to be treated as a non-issue since the plaintiff, having arrived on the scene only sometime in 1956, could not therefore have known herself about the nature of occupation. With regard to the issue of facts the learned trial judge, inter alia, has made certain observation:

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The first defendant relied upon his own testimony (as DW4) and that of his sons (DW1 and DW2) who were born in 1956 and after. Obviously, the sons cannot testify as to what occurred in 1950–1952 when house 241-C was built.

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The plaintiff said that the first defendant moved into 241-C in 1956 after a misunderstanding. She said the first defendant moved into 241-C from 241-A where they had been living together with their parents in 1959 after a misunderstanding between them and their parents and her family. Their relationship had not been good. She said the second defendant moved in with the first defendant in mid November 2001 but does not disagree that the third defendant stayed with the first defendant. Her version is denied by the first Defendant.

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Regardless whether there was a misunderstanding or not, it means it is conceded by the plaintiff that the defendant had moved into 241-C at least by 1956, and had stayed there since. He stayed there obviously with the consent of the mother. It cannot be adverse occupation. The land was transferred to Balwant Singh from 25 January 1980. Similarly, the defendants occupied with the consent of Balwant Singh. It was not adverse occupation. It is clear he had licence to occupy house 241-C. But the question remains whether he had a permanent licence to do so.

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[9] The occupation of the defendants of house 241-C by the first defendant together with his sons has been described as a 'licence to occupy' but not permanent by the trial judge.

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[10] However it has been contended before us that since the defendants have been in occupation with the consent of his mother and subsequently with the consent of Balwant Singh, there has been a failure to appraise 'untroverted

A evidence of contemporaneous conduct' and consequently a failure to make a finding that a proprietary estoppel has arisen. However in so far as events are concerned we accept that the first defendant's sons, not having been born before 1956, could not reinforce the first defendant's contention about the character of his occupation of the 241-C on the said land. This fact is neutral.

B [11] The reliance on the consent although allegedly contemporaneous of conduct needs further evaluation as there is not in existence any form of contractual tenancy. The first defendant depends on the verbal assurances of his mother and the conduct of his brother in requesting for his identity card on one occasion where the reasons for which are not known. They are now deceased persons. There are gaps and lapses in the case of the first defendant. For example, where are the accounts which at the very least, establish the disbursements that have been expended in building homes or maintaining the houses or the other parts of the land alleged by the first defendant as his contributions.

D [12] What is the proprietary estoppel here? Learned counsel for the defendants cited *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352:

F The law on tenancy coupled with an equity or simply an equitable estoppel arose from the speech of Lord Kingsdown in *Sir JW Ramsden, Bart v Lee Dyson and Joseph Thornton* (1865) LR 1 HL 129, in which His Lordship referred to the principle as *irrevocable licence*. This principle was accepted and applied by the Privy Council in *Plimmer and another v The Mayor, Councillors, and Citizens of the City of Wellington* (1884) 9 App Cas 699. Finally it received its judicial refinement in *Inwards and others v Baker* [1965] 1 All ER 446 at p 448. In this case Lord Denning MR defined the concept as follows:

G It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with equity ... that the equity arising from the expectation of land does not fail ... The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money.

H The principle is also known as equitable estoppel, because the landowner whose conduct had raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.

I In the development of our law, this principle was recognised as long ago as 1916 in the case of *MPRL Karuppan Chetty v Suah Thian* [1916] 1 FMSLR 300. It was applied by Chang Min Tat J, as he then was, in *Devi v Francis* [1969] 2 MLJ 169.

Finally it became settled law as a result of the decision of the Federal Court in *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 (FC), which decision was subsequently confirmed by the Privy Council. Its practical application was demonstrated in the decision of Syed Othman J, whose judgment was conformed by the Federal Court in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 1 MLJ 89; [1980] 2 MLJ 16 and in the decision of Abdoolcader J in *Wong Yon Lin v Liew Tham Soon & Ors* [1980] 2 MLJ 99.

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[13] It is notable that both cases rely on the speeches of Lord Kingsdown in *Sir JW Ramsden, Bart v Lee Dyson and Joseph Thornton* (1865) LR 1 HL 129 and the judicial refinement of Lord Denning MR in *Inwards and others v Baker* [1965] 1 All ER 446 at p 448 to advance the contention that proprietary estoppel has been held to be applicable under the Torrens system in Malaysia.

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[14] The judicial precedents cited by counsel for the defendants refer to instances where there is some arrangement founded on tenancies, leases or even a contractual relationship. By asserting the doctrine of proprietary estoppel the effect is to prevent or estop the plaintiff from enforcing her legal property rights. But the claim here goes beyond that and seeks in addition to transfer property rights to the first defendant and his sons. As for the formulation of the elements of proprietary estoppel some guidance may be sought from Commonwealth precedents. In *Willmott v Barber* (1880) 15 Ch D 96, Fry J laid down what is termed as the five probanda which he perceived to be vital in establishing proprietary estoppel:

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In the first place the (claimant) must have made a mistake as to his legal rights. Secondly, the (claimant) must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the (claimant). If he does not know of it then he is in the same position as the (claimant) and the doctrine of acquiescence is founded upon conduct with knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the (claimant)'s mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own legal rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the (claimant) in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do...

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[15] In *Crabb v Arun District Council* [1976] Ch 179 (CA) at p 188C–D Scarman LJ stated:

A Short of an actual promise, if a man by his words or conduct so behaves as to lead another to believe that he will not insist on his strict legal rights — knowing or intruding that the other will act on that belief — and he does so, that again will raise an equity in favour of the other.

B [16] In the statement of the elements of proprietary estoppel frequent reference has been made to the dissenting speech of Lord Kingsdown where it is stated in *Sir JW Ramsden, Bart v Lee Dyson and Joseph Thornton* (1865) LR 1 HL 129:

C If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money on the land

D a court of equity will compel the landlord to give effect to such promise.

[17] However in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd; Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] 1 QB 133 at p 147G–H, Oliver J stated:

E In Lord Kingsdown's examples ... for instance, there is no room for the literal application of the probanda, for the circumstances there postulated do not presuppose a mistake on anybody's part but the fostering of an expectation in the minds of both parties at the time but from which once it had been acted upon, it

F would be unconscionable to permit the landlord to depart.

[18] It has to be expressed with remonstrance that in the appeal before us it is not ventilated with clarity what elements of equitable estoppel are really being relied upon. The term 'contemporaneous conduct' does not draw forth what aspects of promises, acquiescence or expectation that have been established other than the duration of the occupation of the claimed occupation and the alleged inferences of conduct by the first defendant's mother and brother. Judicial precedents indicate that incidents of proprietary interests may emerge from promissory estoppel. On account of the lack of

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H clarity of counsels it becomes incumbent to refer to the following.

[19] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 is not a case on occupation of a land. It is on negligence but the statements contained therein are instructive. Mason CJ opined:

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... That brings me to estoppel, a label which covers a complex array of rules spanning various categories. There are the divisions between common law and equitable estoppel, between estoppel by conduct and estoppel by representation, and the distinction between present and future fact. There are titles such as promissory

estoppel, proprietary estoppel and estoppel by acquiescence. Yet all of these categories and distinctions are intended to serve the same fundamental purpose, namely 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted': *Waltons Stores (Interstate) Ltd v Maher and another* (1988) 164 CLR 387 per Brennan J. See also per Mason CJ and Wilson J; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.

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At common law the principle of estoppel by conduct or representation ('estoppel in pais') provided that protection by preventing the party stopped from unjustly departing from an assumption of fact which his conduct had caused another party to adopt or accept for the purpose of their legal relations: *Grundt; Thompson v Palmer* (1933) 49 CLR 507; *Waltons Stores*. But it was well established that, in order to support an estoppel by conduct, the representation (or assumption) must be a representation of an existing fact, a promise or representation of intention to do something being insufficient for that purpose: *Yorkshire Insurance Company, Limited, and others v Craine* [1922] 2 AC 541.

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The principle of estoppel by conduct or representation applied in equity, as at common law, though in equity the principle was known as equitable estoppel: *Jorden v Money* (1854) 5 HLC 185; *Thompson v Palmer; Waltons Stores*. And in equity it was also well settled that the representation (or assumption) must be of an existing fact, not of future fact or mere intention. That is what *Jorden v Money* decided, despite the fact, as Bowen LJ pointed out in *Edgington v Fitzmaurice* (1885) 29 Ch D 459, that 'the state of a man's mind is as much a fact as the state of his digestion'. This limitation upon the principle of estoppel was seemingly founded upon the notion that to hold a person to an assumption which his conduct has caused another to adopt or accept was tantamount to enforcing a voluntary promise in the absence of consideration. The need to avoid this consequence was an important aspect of the majority reasoning in *Jorden v Money*.

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However, neither the decision nor the reasoning in that case can now be sustained. Promissory estoppel, recognised by this court in *Legione v Hateley* (1983) 152 CLR 406, has undermined the idea that voluntary promises cannot be enforced in the absence of consideration. What is more, promissory estoppel has an extensive area of operation now that it is acknowledged that the doctrine is not confined to pre-existing contractual relationships: see *Waltons Stores*. Furthermore, the acceptance of the doctrine of promissory estoppel has been accompanied by a recognition that the distinction between present and future fact is unsatisfactory and produces arbitrary results instead of serving any useful purpose: *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225; *Waltons Stores; Foran v Wight* (1989) 64 ALJR 1. Indeed, the difference between the majority and Lord St Leonards in *Jorden v Money* was a striking illustration of the arbitrary nature of the distinction.

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In conformity with the fundamental purpose of all estoppels to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted, these developments have brought a greater underlying unity to the various categories of estoppel. Indeed, the consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules: see *Waltons Stores; Foran v Wight; Collin v Holden* [1989] VR 510; *Taylor's Fashions Ltd v Liverpool*

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A *Victoria Trustees Co Ltd; Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] 1 QB 133; *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84; *Attorney-General (Hong Kong) and another v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114.

B One obstacle to the existence of a single overarching doctrine is a suggested difference in the nature of estoppel by conduct on the one hand and equitable estoppel (including promissory estoppel) on the other and in the character of the protection which they respectively provide. Traditionally, estoppel by conduct has been classified as a rule of evidence, available where there is a cause of action, to prevent a person from denying what he previously represented, and has not itself constituted a cause of action: *Grundt; Low v Bouverie* [1891] 3 Ch 82. Being an evidentiary principle, estoppel by conduct achieved, and could only achieve, the object of avoiding the detriment which would be suffered by another in the event of departure from the assumed state of affairs by holding the party estopped to that state of affairs. The rights of the parties were ascertained and declared by reference to that state of affairs. On the other hand, equity was more flexible. Equity was concerned, not to make good the assumption, but to do what was necessary to prevent the suffering of detriment. To do more would sit uncomfortably with a general principle whose underlying foundation was the concept of unconscionability. So, in *Waltons Stores*, a majority of this court concluded that equitable estoppel entitled a party only to that relief which was necessary to prevent unconscionable conduct and to do justice between the parties. Mason CJ and Wilson J referred to the statement of Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179, that the court should determine what was 'the minimum equity to do justice to the plaintiff'. We went on to state: 'Holding the representor to his representation is merely one way of doing justice between the parties.' Similarly, Brennan J said:

F The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case. As Robert Goff J said in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*: 'Of all doctrines, equitable estoppel is surely one of the most flexible.'... However, in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct.

G It follows that, as a matter of principle and authority, equitable estoppels will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more. In appropriate cases, that will require that the party estopped be held to the assumption created, even if that means the effective enforcement of a voluntary promise. To that extent there is an overlap between equitable estoppel generally and estoppel by conduct in its traditional form. But since the function of equitable estoppel has expanded and it has become recognised that an assumption as to future fact may ground an estoppel by conduct at common law as well as in equity, it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory yet produce different results. Moreover, as I have already indicated, the fact that estoppel by conduct has expanded

beyond its evidentiary function into a substantive doctrine means that there is no longer any justification for insisting on the making good of assumptions in every case.

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In any event, there is a very strong case for saying that equity had discarded earlier the notion that the purpose of the rules of estoppel by conduct was to make good the relevant assumption. As Professor Finn points out in his essay 'Equitable Estoppel' in Finn (ed), *Essays in Equity* (1985) at p 68, 'the language of expectations [was] forsaken entirely for that of *equities*' in *Crabb v Arun District Council*. Lord Denning MR had qualified the language of expectations in *ER Ives Investment Ltd v High* [1967] 2 QB 379, by stating that the 'court will not allow [the] expectation to be defeated *when it would be inequitable so to do*'. (Emphasis added.) That qualification, made repeatedly in cases which can be traced back to the Privy Council's statement in *Plimmer and another v The Mayor, Councillors, and Citizens of the City of Wellington* (1884) 9 App Cas 699 that 'the court must look at the circumstances in each case to decide in what way the equity can be satisfied', has transformed the basis of the equitable principles of estoppel: see Finn at pp 62–71.

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In these circumstances, it would confound principle and common sense to maintain that estoppel by conduct occupies a special field which has as its hallmark function the making good of assumptions. There is no longer any purpose to be served in recognising an evidentiary form of estoppel operating in the same circumstances as the emergent rules of substantive estoppel. The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption (see also the conclusion of Lord Denning MR in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*).

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The assumption may be one as to a legal as well as to a factual state of affairs. There is simply no reason to restrict the assumption to a factual matter as there was at the time when the rules of estoppel by conduct were evidentiary. It has already been recognised that an equitable estoppel may relate at least to a matter of mixed fact and law (see *Waltons Stores; Foran v Wight*). Moreover, the distinction between assumptions as to fact and assumptions as to law is artificial and elusive; see the discussion of Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd; Old & Campbell Ltd v Liverpool Victoria Friendly Society*. So it would be productive only of confusion and arid technicality to restrict the operation of the doctrine so as to exclude from its scope an assumption as to a purely legal state of affairs. It is therefore not surprising that long ago the judicial committee recognised that a representation as to the legal effect of an agreement can give rise to an estoppel: *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 Ind App 203; *Calgary Milling Co Ltd v American Surety Co of New York* [1919] 3 WWR 98; see also *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*.

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A The element of detriment presents more difficulty However, the question of detriment is not as simple as such an answer would suggest, and is closely related to the other elements of the claim of estoppel.

B When a person relies upon the correctness of an assumption which is subsequently denied by the party who has induced the making of the assumption, two distinct types of detriment may be caused. In a broad sense, there is the detriment which would result from the denial of the correctness of the assumption upon which the person has relied. In a narrower sense, *there is the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption.*

C The cases concerning estoppel by conduct, at least at common law, were in one respect concerned with the broader concept of detriment. So, Dixon J said in *Grundt* that 'the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it'. This makes it clear that the detriment must flow from the reliance upon the assumption (see *Foran v Wight*), but goes further and suggests that the relief granted by virtue of the estoppel (in that context, that making good of the assumption) corresponds with the detriment which would be suffered were the assumption to be deserted. However, that further suggestion was dictated by the then existing confines of the rules of estoppel by conduct; Dixon J was plainly stating that a person's 'change of position' could not be allowed to 'operate as a detriment'. His Honour's exposition is now instructive as an indication that the detriment against which the law protects is that which flows from reliance upon the deserted assumption, even though at that time the evidentiary rule operated to hold the representor to the assumption created.

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F In the same way, cases of equitable estoppel have been concerned to grant relief where detriment would be suffered if the assumed state of affairs upon which reliance had been placed was held not to exist. But, as we have seen, the relief which equity grants is by no means necessarily to be measured by the extent of that detriment. So, while detriment in the broader sense is required in order to found an estoppel (and it would be strange to grant relief if such detriment were absent), the law provides a remedy which will often be closer in scope to the detriment suffered in the narrower sense.

G ... When a court approaches the task of ascertaining the minimum relief necessary to 'do justice' between the parties, it is not correct to make an assessment of the moral rectitude of the actions of the parties in a manner divorced from a consideration of the legal consequences and attributes of those actions. Thus it must be borne in mind that a voluntary promise is generally not enforceable and that pleadings are susceptible of amendment. The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss. In the same way, with estoppel, something more than a broken promise is required.

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I [20] *Pascoe v Turner* [1979] 2 All ER 945 related to facts which have some similarity:

In the early 1960s the plaintiff, a businessman with investments consisting of private and commercial property, met and became friendly with the defendant, a widow with a small amount of invested capital. In 1968 the defendant moved into the

plaintiff's home as his housekeeper and also helped him with his business. They subsequently lived as man and wife, although the defendant declined the plaintiff's offer of marriage. In 1965 they moved into a house which, together with the contents, was paid for by the plaintiff. The defendant continued to help the plaintiff in his business and was given £3 a week housekeeping. The defendant bought her own clothes and various small things for the house. In 1973 the plaintiff began a relationship with another woman, with whom he later went to live. The plaintiff then told the defendant that she had nothing to worry about and that the house and its contents were hers, but no conveyance was ever drawn up. The defendant continued to live in the house and, with the plaintiff's full knowledge and encouragement, spent a quarter of her modest capital on repairs, improvements and redecorations to the house. In 1976 the plaintiff and the defendant quarreled. On 9 April, the plaintiff's solicitors wrote to the defendant giving her two months' notice to 'determine her licence to occupy' the house and demanded possession on 10 June. The defendant refused to leave the house

There was nothing in the facts from which a constructive trust could be inferred. Therefore, since the defendant had at law no perfected gift or licence other than a licence revocable at will, the court had to decide what was the minimum equity to do justice to her, having regard to the way in which she had changed her position for the worse with the acquiescence and encouragement of the plaintiff.

[21] Cumming-Bruce LJ in his judgment said:

... The relevant principle is expounded in *Snell on Equity* in the passage under the heading 'Proprietary Estoppel', and is elaborated in *Spencer Bower and Turner on Estoppel by Representation* in the chapter entitled 'Encouragement and Acquiescence'. The cases in point illustrating that principle in relation to real property are *Dillwyn v Llewelyn* [1861–73] All ER Rep 384; *Sir JW Ramsden, Bart v Lee Dyson and Joseph Thornton* (1865) LR 1 HL 129 and *Plimmer and another v The Mayor, Councillors, and Citizens of the City of Wellington* (1884) 9 App Cas 699. One distinction between this class of case and the doctrine which has come to be known as 'promissory estoppel' is that where estoppel by encouragement or acquiescence is found on the facts those facts give rise to a cause of action. They may be relied on as a sword, not merely as a shield. In *Sir JW Ramsden, Bart v Lee Dyson and Joseph Thornton* the plaintiff failed on the facts, and the dissent of Lord Kingsdown was on the inferences to be drawn from the facts. On the principle, however, the House was agreed, and it is stated by Lord Cranworth LC and by Lord Wensleydale as well as by Lord Kingsdown. Likewise in *Plimmer's* case the plaintiff was granted a declaration that he had a perpetual right of occupation.

The final question that arises is: to what relief is the defendant entitled on her counterclaim? In *Dillwyn v Llewelyn* there was an imperfect gift of land by a father who encouraged his son to build a house on it for £14,000. Lord Westbury LC said:

About the rules of the court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right

- A or ground of claim which he did not acquire from the original gift. Thus, if A gives a house to B, but makes no formal conveyance, and the house is afterwards, on the marriage of B, included, with the knowledge of A, in the marriage settlement of B, A. would be bound to complete the title of the parties claiming under that settlement. So if A puts B in possession of a piece of land, and tells him 'I give it
- B to you that you may build a house on it', and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made.
- C In *Plimmer's* case the Privy Council posed the question, 'How should the equity be satisfied?' And the board declared that on the facts a licence revocable at will became irrevocable as a consequence of the subsequent transactions. So in *Thomas v Thomas* [1957] NZLR 785 the Supreme Court of New Zealand ordered the defendant to execute a proper transfer of the property.
- D In *Crabb v Arun District Council* this court had to consider the principles on which the court should give effect to the equity: see per Lord Denning MR. Lawton and Scarman LJ agreed with the remedy proposed by Lord Denning MR. On the facts of that case Scarman LJ expressed himself thus:
- E I turn now to the other two questions — the extent of the equity and the relief need to satisfy it. There being no grant, no enforceable contract, no licence, I would analyse the minimum equity to do justice to the plaintiff as a right either to an easement or to a licence on terms to be agreed. I do not think it is necessary to go further than that. Of course, going that far would support the equitable remedy of injunction which is sought in this action. If there is no agreement as to terms,
- F if agreement fails to be obtained, the court can, in my judgment, and must, determine in these proceeding on what terms the plaintiff should be put to enable him to have the benefit of the equitable right which he is held to have. It is interesting that there has been some doubt amongst distinguished lawyers in the past as to whether the court can so proceed. Lord Kingsdown refers to those doubts in a passage, which I need not quote, in. Lord Thurlow clearly thought that the court did have this power. Other lawyers of that time did not. But there can be no doubt that since *Sir JW Ramsden, Bart v Lee Dyson and Joseph Thornton* the courts have acted on the basis that they have to determine not only the extent of the equity, but also the conditions necessary to satisfy it, and they have done so in a great number and variety of cases. I need refer only to the interesting collection of cases enumerated in *Snell on Equity*. In the present case the court does have to consider what is necessary now in order to satisfy the plaintiff's equity.
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- I So the principle to be applied is that the court should consider all the circumstances and, the counterclaimant having at law no perfected gift or licence other than a licence revocable at will, the court must decide what is the minimum equity to do justice to her having regard to the way in which she changed her position for the worse by reason of the acquiescence and encouragement of the legal owner. The defendant submits that the only appropriate way in which the equity can here be satisfied is by perfecting the imperfect gift as was done in *Dillwyn v Llewelyn*.

[22] It is also found that the element of detriment is not properly indicated in the circumstances of this appeal. The judgment in *Gillett v Holt and another* [2000] 2 All ER 289 is also relevant. An outline of the facts however are required:

In 1952, G, who was then 12 years old, met and became friendly with H, a 38 year old gentleman farmer and bachelor. Four years later G left school on H's suggestion to work on his farm, and continued to work for him for nearly 40 years. During that time he moved into a property owned by H's company and, through his wife and children, effectively provided H with a surrogate family. Over the course of their relationship, H gave G repeated assurances, usually before an assembled company on special family occasions, that he would inherit the farm business, and in 1986 executed a will leaving G his residuary estate. After 1992, the relationship between the two men began to cool, and in 1994, H executed a new will, naming W as chief beneficiary, but giving pecuniary legacies to G and his family and allowing G to occupy his home for as long as he liked. The following year, H summarily dismissed G and made another will, excluding G entirely and removing the provision concerning the occupation of his home. G subsequently brought an action against H and W, claiming an equity in H's property under the doctrine of proprietary estoppel arising from reliance on the latter's assurances. In order to establish the requisite element of detriment, G relied, inter alia, on his failure to seek or accept offers of employment elsewhere or to go into business on his own account, the carrying out of tasks beyond the normal scope of the employee's duty and his failure to take substantial steps to secure his future wealth.

[23] Robert Walker LJ stated, inter alia:

Both sides agree that the element of detriment is an essential ingredient of proprietary estoppel. There is one passage in the judgment of Lord Denning MR in *Greasley and others v Cooke* [1980] 3 All ER 710 at p 713; [1980] 1 WLR 1306 at p 1311 which suggests that any action in reliance on an assurance is sufficient, whether or not the action is detrimental. In *Watts v Storey* (1983) 134 NLJ 631 Dunn LJ (who was a party to the decision in *Greasley v Cooke* [1980] 3 All ER 710) explained Lord Denning MR's observations as follows:

Nor, if that passage from Lord Denning MR's judgment is read as a whole, was he stating any new proposition of law. As the judge said, it matters not whether one talks in terms of detriment or whether one talks in terms of it being unjust or inequitable for the party giving the assurance to go back on it. It is difficult to envisage circumstances in which it would be inequitable for the party giving an assurance alleged to give rise to a proprietary estoppel, ie an estoppel concerned with the positive acquisition of rights and interests in the land of another, unless the person to whom the assurance was given had suffered some prejudice or detriment.

The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so

A long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.

There are some helpful observations about the requirement for detriment in the judgment of Slade LJ in *Jones v Watkins* [1987] CA Transcript 1200. There must be sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded — that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved.

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As authority for the second of these observations Slade LJ referred to Spencer Bower and Turner Law, *The Relating to Estoppel by Representation* (3rd Ed, 1977) at p 110, which in turn cites the judgment of Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at pp 674–675 (High Court of Australia):

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One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice.

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I [24] There are also enlightening statements found in *Waltons Stores (Interstate) Ltd v Maher and another* (1988) 164 CLR 387 bearing in mind however that it is a case concerning contractual relationship. In that case there arose an issue about the negotiations for a lease and whether a lease has been concluded. Brennan J in his grounds of judgment considered extensively the question of promissory estoppel giving rise to an obligation. The relevant portions of his judgment are cited as follows:

The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case. As Robert Goff J said in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*: 'Of all doctrines, equitable estoppel is surely one of the most flexible.' Sometimes it is necessary to decree that a party's expectation be specifically fulfilled by the party bound by the equity; sometimes it is necessary to grant an injunction to restrain the exercise of legal rights either absolutely or on condition; sometimes it is necessary to give an equitable lien on property for the expenditure which a party has made on it: see *Snell's Principles of Equity*, (1982), (28th Ed) at p 562. However, in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct. What, then, is unconscionable conduct? An exhaustive definition is both impossible and unnecessary, but the minimum elements required to give rise to an equitable estoppel should be stated.

Some indication of what constitutes unconscionable conduct can be gleaned from the instances in which an equity created by estoppel has been held to arise. If cases of equitable estoppel are in truth but particular instances of the operation of the general principles of equity, there is little purpose in dividing those cases into the categories of promissory and proprietary estoppel which are not necessarily exhaustive of the cases in which equity will intervene. Like Scarman LJ in *Crabb v Arun District Council*, I do not find it generally helpful to divide into classes the cases in which an equity created by estoppel has been held to exist. However, the familiar categories serve to identify the characteristics of the circumstances which have been held to give rise to an equity in the party raising the estoppel. In cases of promissory estoppel, the equity binds the holder of a legal right who induces another to expect that that right will not be exercised against him: see, eg, *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439; *Birmingham and District Land Co v London and North Western Railway Co* (1888) 40 Ch D 268; *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326; *Bank Negara Indonesia v Philip Hoalim* [1973] 2 MLJ 3. In cases of proprietary estoppel, the equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him: see Sir JW Ramsden, *Bart v Lee Dyson and Joseph Thornton; Plimmer and another v The Mayor, Councillors, and Citizens of the City of Wellington* (1884) 9 App Cas 699; *Inwards and others v Baker* [1965] 1 All ER 446. In cases where there has been an imperfect gift of property the equity binds the donor of the property when, after the making of the imperfect gift, he does something to induce the donee to act on the assumption that the imperfect gift is effective or on the expectation that it will be made effective: see *Dillwyn v Llewelyn; Olsson v Dyson* (1969) 120 CLR 365.

In all cases where an equity created by estoppels is raised, the party raising the equity has acted or abstained from acting on an assumption or expectation as to the legal relationship between himself and the party who induced him to adopt the assumption or expectation. The assumption or expectation does not relate to mere facts, whether existing or future (an assumption as to a legal relationship may be an assumption that there is no legal relationship, as in the cases where A builds on B's land assuming it to be his own). Though the party raising the estoppel may be under no mistake as to the facts, he assumes that a particular legal relationship exists or expects that a particular legal relationship will exist between himself and the party

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A who induced the assumption or expectation. The assumption or expectation may involve an error of law. *Thus a promissory or a proprietary estoppel may arise when a party, not mistaking any facts, erroneously attributes a binding legal effect to a promise made without consideration. But, if the party raising the estoppel is induced by the other party's promise to adopt an assumption or expectation, the promise must be intended by the promisor and understood by the promisee to affect their legal relations.* In *Combe v Combe* [1951] 2 KB 215 Denning LJ, the chief modern proponent of equitable estoppel, emphasised this element:

C The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was *intended to affect the legal relations between them and to be acted on accordingly*, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has introduced, even though it is not supported in point of law by any consideration but only by his word. (Emphasis added.)

E However, His Lordship's enunciation of the principle does not bring out the basic object of the doctrine which, like the object of estoppel in pais, is to avoid the detriment which the promisee would suffer if the promisor fails to fulfil the promise. It will be necessary to return to consider the basic object of the doctrine, but for the moment it is important to observe that the doctrine has no application to an assumption or expectation induced by a promise which is not intended by the promisor and understood by the promisee to affect their legal relations.

F [25] In the appeal before us, it is not the plaintiff but the defendants who are claiming the equity. One question to be raised here is, what exactly is the position of the first defendant on the land. Is he occupying as a licensee with consent (if so revocable or irrevocable) or is he a tenant. There is absolutely no evidence of a contractual arrangement other than a family arrangement. The evidence furnished by the first defendant does not establish anything to negate that the legal title to the said land in its entirety does vest in the plaintiff. However while there are suggestions that there are other occupants who are referred to as tenants, the first defendant has averred that he has expended monies. This averment also lacks in details and particulars. Neither is there available to establish that the first defendant has collected rents or paid quit rents or assessments.

I [26] In the circumstances of this appeal too it is not clearly borne out whether there is a fostering of an expectation or a unilateral mistake of a right to the claimed property. In this case, the first defendant as claimant persists on a stand that some form of assurance had been held out and initiated by his mother.

[27] However when it is maintained that he moved out of his parents abode to occupy the claimed portion, whatever dwelling house that is built on the land would inure for his own benefit and that of his family and not really for the benefit of the land. It is already alluded to above that there is a paucity of evidence as to the nature of contribution made by the first defendant in respect of other lots on the total said land. He alleged that he had contributed labour or services or even capital but his claim is still on the claimed portion of the said land.

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[28] There is also an amalgam of doubt about the elements to constitute proprietary estoppel in the circumstances of this appeal. In so far as conduct and acquiescence which seem the elements strongly relied upon by the first defendant, the evidence does indicate that he has secured the permission of his parents to remain on the claimed portion. But the following is also observed. Upon the demise of his father, the said land was already transferred to his mother and before her demise the land was already conveyed to his brother.

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[29] Assuming that the first defendant is successful in establishing proprietary estoppel the matter has to be considered from another aspect.

[30] The equity that is sought to be enforced here is not only for the benefit of the first defendant but also to be extended to his sons. Even if it were to be accepted that there is in existence 'unconscionable conduct' which was not initiated or instigated by the plaintiff the ensuing question is whether there is here created a right in rem or a right in personam. There is not established here an interest arising from equity that is recognisable under National Land Code. The Privy Council in *United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 in the speech of Lord Keith of Kinkel offered explanations which are useful in the context of this appeal. That case pertained to the granting of an application for relief against forfeiture. References were made to ss 3(1) and 6 of the Civil Law Act 1956:

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... Section 133 makes provision for any proprietor of alienated land who has incurred a forfeiture to apply to the state authority for annulment of it, and gives the authority absolute discretion to refuse the application or to allow it conditionally or unconditionally.

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Under sub-s (3) the authority may, notwithstanding such refusal, reallocate the land to the same proprietor upon such terms as it may determine. These provisions evince an intention that the authority should have complete control over whether or not a proprietor who has incurred forfeiture should be reinstated, and if so upon what terms. Then s 237 provides for application to the court for relief against forfeiture by

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A lessees and others whose tenure is exempt from registration. The absence of any similar provision in favour of proprietors of alienated land is a strong indication of an intention that in their case no such right of application was to be available. This argument for the appellants must therefore be rejected.

B It was further argued for the appellants that the English rules regarding relief against forfeiture were imported generally into the law prevailing in Johore by s 3(1) of the Civil Law Act 1956 which, so far as material, provides:

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C (1) Save in so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956.

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For the reasons already given, Their Lordships are of opinion that the relevant provisions of the Code evince an intention that the English rules of equity relating to relief against forfeiture should not be available to proprietors of alienated land. Section 3(1) of the 1956 Act cannot therefore avail the appellants, since these provisions are inconsistent with the rules in question.

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It is necessary to notice finally s 6 of the Civil Law Act 1956 which provides:

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Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

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It was argued for the appellants that this enactment did not preclude the application of the English equitable rules as to relief against forfeiture since these rules were not part of the law of England relating to the tenure of immovable property. 'Tenure', so it was maintained, meant only the mode of holding land, and the rules of equity were something different. But, in Their Lordships' opinion, laws relating to the tenure of land must, applying the ordinary and natural meaning of these words, embrace all rules of law which govern the incidents of the tenure of land, and among these incidents is the right, in appropriate circumstances, to the grant of relief against forfeiture.

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The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

[31] It is noted that the first defendant chose not to take any action to lodge his claim earlier. The claim is that he acted on a belief that some form of

proprietary interest would accrue as a result of the continuous stay on the claimed land. It is found that the equity that he is claiming does not fall within the following provision of the National Land Code ('NLC') s 206(1), (2), (3):

- (1) Subject to the following provisions of this section —
 - (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and
 - (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.
- (2) The provisions of sub-section (1) shall not apply to —
 - (a) the creation of, or other dealings affecting, tenancies exempt from registration (which may be effected, instead, as mentioned in sub-section (2) of section 213); or
 - (b) ...
- (3) *Nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.*

[32] Overall there is not denied here that the first defendant has been permitted a licence. Although by the very nature of the permission granted the first defendant is said to be person with a degree of exclusive possession with his sons but it remains a licence. A lengthy discussion of this is found in *Radaich v Smith* (1959) 101 CLR 209, Windeyer J in his judgment rendered some pertinent observation:

... What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second. A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass. A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with a grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long established law: see *Cole on Ejectment* (1857) at pp 72, 73, 287 and 458.

A Recently some transactions from which in the past tenancies at will would have been inferred have been somewhat readily treated as creating only licences. And it has been said — especially in connection with family relationships, charity or hospitality — that allowing a person to have the exclusive possession of premises does not necessarily indicate a tenancy as distinct from a licence.

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[33] Judith Sihombing in *National Land Code — A Commentary*, Binder 2, Chapter XXI at para 251 explains:

C The significance of the difference between the licence and the lease is that a licence of itself does not create an interest in land. A licence is a personal obligation; if any remedy is available on breach, then it will be damages although the general rule is that breach is not remediable, especially where it is a gratuitous licence. A lease on the other hand creates an interest in land which, on dispossession, entitles the lessee to recover possession of the land. The difference becomes essential also where it is sought to prove that the claimant has an interest in land enforceable against third parties and one capable of protection within the terms of the legislation. Without additional elements (for example a licence coupled with a grant), a licence is not an interest in land and would not be enforceable against third parties and is not entitled to any protection under the Code nor under any legislation giving security of tenure to tenants.

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[34] Lord Denning rephrased the concept in *Inwards and others v Baker* (above) as:

F It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with equity ... that the equity arising from the expectation of land does not fail.... The court can look at the circumstances and see whether there is any equity arising out of the expenditure of money.

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[35] The trial judge in the course of his judgment stated, inter alia:

H It is clear that the first defendant relied upon promises allegedly made by Balwant Singh. Such promises were not admitted by the plaintiff to have been made. If the first defendant believed he had a right to house 241-C and then saw the property transferred by his mother to his brother Balwant Singh, he could hardly be expected to have remained relatively passive, leaving it to Balwant Singh to provide for his rights to house 241-C. Further, when Balwant Singh died in 1994 the issue must necessarily surface again. On 13 January 1995 an order of distribution was made under the Small Estates (Distribution) Act 1955 to transfer the land to the plaintiff. No action emerged from the defendants. That the plaintiff gave notice to evict the

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defendants on 7 October 1998 is no worse than the defendants' own lack of diligence to establish their claim to house 241-C even after the said land upon which the house was built was transferred to the plaintiff.

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[36] It is simplistic argument to say that when the plaintiff states that she has no knowledge of certain state of matters, she is therefore taken to have admitted whatever has been asserted by the first defendant. The first defendant has alleged that his mother and his brother had both made declaratory statements of intention that the first defendant has relied on as some form of assurances. The question here is whether when the first defendant chose not to initiate any action to lodge a claim it is based on the belief that some form of interest has already been vested in him. If his mother had the title transferred to his brother this would negate the assertions of the first defendant that there is indeed a repetition of the assurance over a long period. The first defendant has not succeeded in establishing a material fact, that is, that the alleged statements of the intention of the mother amounted to more than statements of revocable present intention. When no positive steps were taken by mother and brother then it is the first defendant who has failed to act on the faith of a belief. Apart from the danger of militating against s 206(3) of the NLC, we are in effect being asked to cause a metamorphosis of the licence to some form of unregistrable interest in the land not capable of recognition under the NLC. We are being requested to create a proprietary interest in land tenure arising from a licence within a family relationship.

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[37] No finding could be made here that the judge has misdirected himself on a question of law. This is a family arrangement where the creation of an interest in the land would be beyond the scope of land tenure under the NLC.

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[38] In the circumstances the conclusion of the trial judge is affirmed. However we differed from the trial judge in that it is not reasonable for the revocable licence to be withdrawn where the defendants have been ordered that vacant possession be given within four months.

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[39] We substituted that with an order that vacant possession be given within six months with effect from the date of our order. Apart from this modification, we therefore dismissed the appeal with costs and the orders of the High Court are affirmed.

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A [40] For completeness we wish to add that there is a second Appeal No W-03-159 of 2006. The appeal by agreement of the parties has been withdrawn. The appeal has been struck off with the costs to follow the outcome of this Appeal No W-02-391 of 2004.

B *Appeal dismissed with costs.*

Reported by Kohila Nesan

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